A labor union may not financially support a public official,[24] or control him while in office,[25] because the office is a public trust requiring the untrammeled judgment of the incumbent. Such a judgment is desired from every voter, since all, for the purpose of voting, are public officials. Consequently an agreement to vote in a certain way is clearly unenforceable.[26] A by-law of a labor union providing that any member not voting as directed should be expelled would be equally invalid.[27] Yet this is but one step logically beyond the principal case and rests on the same kind of considerations. On the whole, the result in the principal case seems satisfactory. But the question is a very nice one, and a slight variation in the facts might well lead to the opposite result.

LIABILITY OF A STATE ENGAGED IN COMMERCIAL ENTERPRISES. — In view of the present tendencies toward governmental ownership and administration of commericial industries, apparent in some of our western states,[1] the question is becoming increasingly important, whether the state, in controversies arising from such enterprises, may be sued without its consent. In a recent case[2] in which a depositor of the Bank of North Dakota sought to garnish credits of the bank, the Supreme Court of North Dakota answered this question in the affirmative. It is submitted that the decision is unsound.

It has not been at all uncommon for states to be interested in commercial enterprises through stock ownership in corporations. Chief Justice Marshall's *dictum* in *Bank of the United States* v. *Planters' Bank*,[3] to the effect that a government which becomes a partner in a trading company takes for that purpose the character of a private citizen, was in reality directed toward the corporate situation only.[4] There applied, it is, of course, sound. A legal entity has been created which, by the terms of its creation, may sue and be sued.[5] Whether the state owns little or all of the stock is immaterial.[6] A different situation is presented, however, when the industry is owned by the state and operated in its name by an adminstrative body.[7] No corporate interme-

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[24] Osborne *v.* Amalgamated Society, [1909] 1 Ch. 163; Amalgamated Society *v.* Osborne, [1910] A. C. 87.

[25] Schneider *v.* Local Union, 116 La. 270, 40 So. 700 (1905). See Amalgamated Society *v.* Osborne, [1910] A. C. 87, 99, 111.

[26] See 3 WILLISTON, CONTRACTS, § 1732.

[27] See Osborne *v.* Amalgamated Society, [1909] 1 Ch. 163, 193.

[1] See Andrew A. Bruce, "State Socialism and the School Land Grants," 33 HARV. L. REV. 401.

[2] Sargent County *v.* State, Doing Business as Bank of North Dakota, 182 N. W. 270 (N. D., 1921). For the facts of this case see RECENT CASES, *infra*, p. 346.

[3] 9 Wheat. (U. S.) 904, 907 (1824).

[4] See 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 3 ed., 519.

[5] An illustration of this is presented by the Emergency Fleet Corporation. In the Matter of Eastern Shore Shipbuilding Corporation, Bankrupt (Emergency Fleet Corporation *v.* Wood), 54 Chi. L. N. 58 (2d. Circ., 1921).

[6] Darrington *v.* Bank of Alabama, 13 How. (U. S.) 12 (1851). The state of Alabama was the only stockholder of the bank.

[7] That is the method employed in North Dakota. See 1919 LAWS OF NORTH DAKOTA, c. 151.

diary exists which may be sued.[8] Does the mere fact that the state is engaging in a heretofore private venture make it amenable to suit?[9]

The early technical basis of the doctrine of sovereign immunity was that the "King cannot be sued by writ, for he cannot command himself."[10] The broader reason is that it would hamper the performance of the sovereign's public duties to subject him to suits as a matter of right.[11] In light of the cases[12] supporting the constitutionality of the North Dakota statutes[13] providing for the bond issues with which to finance these enterprises, it cannot be seriously contended that the state in undertaking them is not performing public duties. The power to engage in these ventures was granted to the state by constitutional amendment.[14] The purpose was to promote the welfare of all; state money was used to finance them; the state in its own name owns and operates them; their profits go to the state. Giving due regard to the powers granted and received, the nature, importance, and purposes of the enterprises, and the way in which they have been regarded by courts[15] and legislatures, the conclusion seems inevitable that the state, in the exercise of these enlarged functions, acts in none other than its sovereign capacity. The rule of sovereign immunity would, therefore, apparently apply in this situation. But the broader argument on which the rule is based loses much of its force when the public duty concerned is that of conducting a commercial enterprise, not necessarily incident to government or regarded as such. Further, expediency demands that in the conduct of such business parties to transactions have reciprocal remedies. In view of these considerations it is arguable that the court should abrogate the rule in so far as the reasons underlying it are no longer persuasive.

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[8] The North Dakota court reasoned in effect that the state, though conducting the bank, was not doing so in its capacity as a sovereign state, and that therefore its credits were subject to garnishment, even in the absence of legislative consent to such proceedings. Sargent County *v.* State, Doing Business as Bank of North Dakota, *supra*.

[9] Authorities do not support such a proposition. A libel will not lie against a ferry boat owned by the Crown. Young *v.* Steamship Scotia, 89 L. T. R. 374 (1903). Nor will a suit lie against a railway whose assets have been conveyed to the government. Ballaine *v.* Alaska Northern Ry. Co., 259 Fed. 183 (9th Circ., 1919). When South Carolina operated the liquor business, a suit against a liquor dealer was dismissed as being in substance a suit against the state. Murray *v.* Wilson Distilling Co., 213 U. S. 151 (1909). *Cf.* South Carolina *v.* United States, 199 U. S. 437 (1905). See also 17 HARV. L. REV. 270.

[10] COMYNS'S DIGEST, Praerogative D. 78. See also 2 BLACKSTONE, COMMENTARIES, 3 ed., Book 3, p. 252; GEORGE STUART ROBINSON, CIVIL PROCEEDINGS BY AND AGAINST THE CROWN, p. 2.

[11] Briggs *v.* Light-Boats, 11 Allen (Mass.), 157, 162 (1865).

[12] Green *v.* Frazier, 176 N. W. 11 (N. D., 1920), aff'd, 253 U. S. 233 (1920).

[13] 1919 LAWS OF NORTH DAKOTA, c. 148. Other acts of the same year regarding state industries were: c. 147, banks; c. 149, dairies; c, 150, home building associations; c. 152, mills and elevators.

[14] 1919 LAWS OF NORTH DAKOTA, AMENDMENTS TO THE CONSTITUTION, 1918, Art. xxxii.

[15] The North Dakota court, speaking of the Bank of North Dakota, declared, it functions "as an agency of the sovereign power of the State, in like manner as the treasurer of the State of North Dakota." Green *v.* Frazier, 176 N. W. 11, 18 (N. D., 1920).

Such action on the part of the court would, however, be open to grave objections. The doctrine of the immunity of a sovereign in his own courts is thoroughly and unqualifiedly established in our system of law.[16] Though in particular cases its reason may be attacked as valueless, its existence must be recognized, and for a court to overthrow or modify it would be judicial legislation. Further, in every case the question would arise, how to determine which undertakings should and which should not subject the state to suits. Rules of law would not answer that question. An examination of the particular enterprise, considered in its relation to other state undertakings, with a careful weighing of the conflicting interests and of the various considerations of expediency involved, would be necessary. Such a problem is in its nature one with which legislatures rather than courts should deal. Actually, legislatures do deal with it. When they provide for administration of state activities, they explicitly declare in what manner claims against the state may be settled, and what legal proceedings, if any, may be brought against it.[17] Such provisions are results arrived at with deliberation, and unless the courts can find therein consent expressed or implied, no suits against the state should be permitted.[18]

RECENT CASES

ADMIRALTY — JURISDICTION — IMMUNITY OF GOVERNMENT VESSELS FROM ARREST. — A libel *in rem* was brought against a ship owned by the Italian Government and operated by a ministry of that government in regular commercial business. Proctors for the ship asserted the sovereign immunity in its favor. *Held*, that the libel may be sustained. *The Pesaro*, Dist. Ct., S. D. N. Y., Oct. 1, 1921.

For a discussion of the principles involved, see NOTES, *supra*, p. 330.

CONFLICT OF LAWS — PARTNERSHIP — WAR — ALIEN PROPERTY CUSTODIAN — DISSOLUTION OF FOREIGN PARTNERSHIP BY DECLARATION OF WAR. — In 1912, X, a citizen and resident of the United States, and Y, a subject and resident of Germany, formed a partnership, doing business both in Germany and the United States. War was declared by the United States against the Imperial German Government in 1917. Pursuant to the provisions of the Trading with the Enemy Act, the domestic assets of the partnership came into the custody of the Alien Property Custodian. X sues the Alien Property Custodian, under a statute, seeking to have the defendant pay over to the plaintiff a partner's share of the property. (TRADING WITH THE ENEMY ACT, § 9; 40 STAT. AT L. 419; U. S. COMP. STAT., ANN. SUPP., 1919, § 3115½e.) The defendant contends that the partnership was organized under German law, and that therefore, by German law, it was not dissolved on the out-

[16] Beers *v.* State of Arkansas, 20 How. (U. S.) 527, 529 (1857); Smith *v.* Reeves, 178 U. S. 436, 448 (1899). See 15 HARV. L. REV. 59.

[17] This was true with respect to the statute in the principal case. See 1919 LAWS OF NORTH DAKOTA, c. 147, § 22. Garnishment proceedings were not included within the specific classes of suits permitted.

[18] For a discussion of the general question of sovereign immunity, see the dissenting opinion of Mr. Justice Iredell in Chisholm *v.* Georgia, 2 Dallas (U. S.), 419, 429 (1793).